



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: KARANJA, GATEMBU & SICHALE J.J.A)**

**CIVIL APPEAL NO. 88 OF 2018**

**BETWEEN**

**MOHAMED AHMED ABDUN.....1<sup>ST</sup> APPELLANT**

**ALI AHMED DAHMAN.....2<sup>ND</sup> APPELLANT**

**AND**

**MINI BAKERIES (MSA) LIMITED.....RESPONDENT**

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Mombasa

(Njoki Mwangi, J.) dated 23<sup>rd</sup> March, 2017 in *H.C.C.APP. No. 117 of 2008*)

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**JUDGEMENT OF THE COURT**

1. Mohamed Ahmed Abdun, the 1<sup>st</sup> appellant, was employed by Mini Bakeries (Msa) Ltd, the respondent, a company carrying on bakery business in Kenya, as its Branch Manager in Mombasa with effect from 1<sup>st</sup> June 2003 on terms set out in a letter of appointment dated 6<sup>th</sup> June 2003.
2. During the 1<sup>st</sup> appellant's tenure as Branch Manager, an internal audit of the respondent's business at the branch, on or about 15<sup>th</sup> July 2004, revealed that there were fictitious entries in the loading books, discrepancies in cashflow and a shortfall of Kshs.401,860.00 for which the respondent held the 1<sup>st</sup> appellant, as the branch manager, responsible.
3. According to the respondent, the 1<sup>st</sup> appellant accepted responsibility for that shortfall and executed an agreement dated 15<sup>th</sup> July 2004 witnessed by the operations manager,, the internal auditor and the accounts manager of the respondent. That agreement was in the following terms:

**“I, Mohamed Ahmed Abdun... Herewith commit to have the following shortfall of bread at Likoni Bakery where I was assigned to perform my duties as a Branch Manager:**

**.....Kshs. 401,860.00**

**I therefore commit to pay the above amount in full to clear my outstanding with Mini Bakeries (Msa) Ltd.**

**I also wish to commit that I was misleading the Management showing false figures in my loading register.”**

4. A few days later, on 21<sup>st</sup> July 2004, to further secure the payment of the said amount to the respondent, the 2<sup>nd</sup> appellant, who is the father to the 1<sup>st</sup> appellant executed an agreement committing to pay the said amount. The agreement by the 2<sup>nd</sup> appellant provided:

**“I, the undersigned Ali Ahmed Dahman (Father)... hereby accept liability for the shortfall incurred by my son Mohamed Ahmed Abdun... and pay Mini Bakeries (Msa) Ltd a sum of Kshs. 401,860.00 as hereunder:**

**Current payment. Kshs. 100,000.00**

**The balance to commence immediately after one month in installments of at least Kshs. 30,000/-per month until completion.”**

5. That agreement was witnessed by one Ahmed Ali Mohammed who was described as Brother in law, the operations manager of the respondent, the internal auditor and the accounts manager of the respondent.
6. Pursuant to those agreements, approximately one month after those agreements were executed, the appellants paid Kshs. 70,000.00 to the respondent on 18<sup>th</sup> August 2004 leaving a balance of Kshs. 331,860.00.
7. In a bid to recover that amount of Kshs. 331,860.00, the respondent filed suit against the appellants before the Resident Magistrate’s Court at Mombasa, being Civil Suit No. 151 of 2005 in which it sought judgment against the appellants.
8. In their defence, the appellants denied the respondent’s claim. In particular, the 1<sup>st</sup> appellant denied signing the agreement dated 15<sup>th</sup> July 2004. The 2<sup>nd</sup> appellant averred that the respondent’s agent misled him to sign the agreement “*by falsely stating that*” the 1<sup>st</sup> appellant “*had signed the agreement.*” It was pleaded further in the defence that “*at the time the agreement dated 15<sup>th</sup> July 2004 was signed by the [2<sup>nd</sup> appellant], the [1<sup>st</sup> appellant] was in police custody and the agreement was procured through intimidation, duress and coercion.*”
9. An application by the respondent to obtain summary judgment against the appellants was not successful and the matter proceeded to trial.
10. During the trial, the respondent called Yunus Abdulrahman Baghan, the internal auditor who conducted the internal audit at the branch where the shortfall was established, as its only witness. Baghan testified that after the audit the matter was reported to Makupa Police Station; that the 1<sup>st</sup> appellant was arrested but was not taken to court; that the 1<sup>st</sup> appellant and his father agreed to pay the shortfall; that the complaint made to the police was withdrawn; that the appellants paid an amount of Kshs 70,000 thereafter and Kshs.331,860.00 remained unpaid.
11. The witness testified further that the 1<sup>st</sup> appellant absented himself from work and was summarily dismissed in terms of a letter dated 10<sup>th</sup> November 2004 which he produced.
12. Under cross examination the witness stated that he reported the matter to the police on 18<sup>th</sup> July 2004; that the 1<sup>st</sup> appellant was arrested on that date and remained in custody until 20<sup>th</sup> or 21<sup>st</sup> July when the father signed the agreement guaranteeing payment.
13. In his defence the 1<sup>st</sup> appellant stated he worked for the respondent for six months as the Branch Manager in 2003 and was in charge of production and sales; that he did not handle cash which was handled by a cashier; that he did not steal any money from the respondent; that he went to the office, was arrested and put in Makupa Police Station; and that his employment was terminated whilst he was on leave.
14. Under cross-examination the 1<sup>st</sup> appellant agreed that he signed the agreement to pay. He could not remember the date he was arrested but was clear that he did not sign the agreement in the police station and that he paid Kshs.70,000 to the respondent when he was out of the police station. In his words, “*I was arrested*

I went to the cells ... the next day they removed me from the cells took me to the office and I signed the agreement. I was not in the police cells when I signed. I did not report to the police that I was being harassed. The guarantor was my father.”

15. Based on that evidence, the trial magistrate, Adika, RM, was not satisfied that the respondent had established its claim and dismissed it. The trial magistrate observed that the 1<sup>st</sup> appellant was arrested by the police and kept in custody for two days, released to the offices of the respondent and made to sign the agreement. The court concluded, “it is very clear that the agreement was under duress. The [1<sup>st</sup> appellant] signed it to avoid being taken to the cells.”

16. On appeal by the respondent, the High Court was not satisfied that duress had been established. The Judge stated:

**“I note from the evidence adduced by PWM that on 15 July 2004 when the first respondent signed the agreement, he had not been arrested. He was arrested on 18 July 2004 after he absconded duty.”**

17. Being satisfied that the appellants were liable under the agreements they had executed to pay to the respondent the amount that remained after the payment of an initial Kshs.70,000.00, the court set aside the judgment of the trial court and entered judgement for the respondent for Kshs.331,880.00. In doing so, the judge stated:

**“It is my finding that by undertaking liability on behalf of the first respondent, the second respondent became jointly and severally liable to pay the debt in issue with the first respondent. It is my considered finding that the learned magistrate erred when she (sic) dismissed the appellant’s claim despite the evidence tendered in support of the appellant’s case. The appellant discharged its burden of proof to the required standard.”**

18. In this second appeal, the appellants have faulted the Judge in her evaluation of the evidence and for reaching a wrong conclusion that the respondent had proved its case to the required standard and that on the whole the respondent’s case was not supported by the evidence.

19. The only issue for a consideration in this appeal, being as it is, a second appeal, is whether the agreements executed by the appellants undertaking to pay the amount in question to the respondent were procured by duress. In that regard the appellants defence to the respondent's claim as pleaded in the plaint, as already noted, was a denial that the 1<sup>st</sup> appellant had signed "the agreement dated 15 July 2004 or at all" and that:

**"The 2<sup>nd</sup> [appellant] states that the [respondent's] agent misled the [appellant] to sign the agreement by falsely stating that the 1<sup>st</sup> [appellant] had signed the agreement.**

**The 1<sup>st</sup> [appellant] further states that at the time the agreement dated 15th July 2004 was signed by the 2<sup>nd</sup> [appellant], the 1<sup>st</sup> [appellant] was in police custody and the agreement was procured through intimidation, duress and coercion."**

20. According to **Mr. Khatib** learned counsel for the appellants, who relied on his written submissions which he orally highlighted, it was demonstrated that the 1<sup>st</sup> appellant was locked up in the police station from 18<sup>th</sup> July 2004 until 22<sup>nd</sup> July 2004 when he was released and made to sign the agreement after which the complaint made to the police by the respondent was withdrawn; that the agreement was therefore obtained by coercion and duress and the trial court was correct in so concluding.

21. In support of his argument, Mr. Khatib made reference to a decision of this Court in the case of **Nabro Properties Limited vs. Sky Structures Ltd [1986] eKLR**; the English case of **Pao On vs. Liu Yiu Long [1980]AC 614** and the **Black's Law Dictionary**, 8<sup>th</sup> edition for the proposition that subjecting a person to improper pressure, as was the case here, he argued, which overcomes his will and coerces him to comply with a demand is duress. Furthermore, counsel submitted, the amount claimed by the respondent against the appellants was not, in any event, established.

22. Opposing the appeal, learned counsel **Ms. Mukoya** holding brief for **Mrs. Maina** for the respondent submitted that there was no evidence of duress; that evidence was led that once discrepancies were found by the internal auditor, the 1<sup>st</sup> appellant signed an agreement on 15<sup>th</sup> July 2004 in which a breakdown of the amount claimed was set out; that the 1<sup>st</sup> appellant did not deny signing that agreement and his arrest was subsequent to that agreement, that is on 18<sup>th</sup> July 2004, and it cannot therefore be claimed that there was duress in procuring the agreement; that the initial payment of Kshs.70,000.00 was paid later leaving the balance of Kshs.331,860.00.

23. It was submitted that in the foregoing circumstances, the contention by the appellants that the agreements in which they committed to pay the said amount to the respondent was procured by duress is unfounded. Counsel made reference to the case of **John Mburu vs. Consolidated Bank of Kenya [2018] eKLR**; **Ghandhi & another vs. Ruda (1986)KLR 556**; and **Kenya Commercial Bank Ltd & another vs. Samuel Kamau Macharia & 2 others [2008] eKLR** for the proposition that duress was not established.

24. Having considered the appeal and submissions by counsel, the only issue in this appeal, as already stated, is whether the agreements executed by the appellants committing to pay Kshs.401,860.00 to the respondent were procured by, and vitiated by duress.

25. The editors of **Chitty on Contracts**, 13<sup>th</sup> edition, volume 1 note at paragraph 7-003, that a contract which has been entered as a result of duress may be avoided by the party who was threatened.

Duress is broadly defined in **Black's Law Dictionary**, 8<sup>th</sup> edition as:

**"a threat of harm made to compel a person to do something against his her will or judgment"**

and strictly, as:

**"the physical confinement of a person or the detention of a contracting party's property."**

26. In **Nabro Properties Limited vs. Sky Structures Ltd** (above) this Court adopted an extract from **Cheshire & Fifoot's Law of Contract**, 8<sup>th</sup> edition as a correct statement of legal duress sufficient to vitiate an agreement, that:

**"Duress at common law, or what is sometimes called legal duress, means actual violence or threats to violence to the person i.e, threats calculated to produce fear or loss of life or real harm."**

27. In **Pao On vs. Lau Yiu Long [1980] A.C. 614** to which counsel on both sides referred, the Privy Council while accepting that economic duress might be recognized in principle in law insisted:

**"... that the basis of such recognition is that it must amount to a coercion of will, which vitiates consent. It must be shown that payment made or the contract entered into was not a voluntary act."**

28. In **Lynch vs. D.P.P. of Northern Ireland [1975] A.C. 653** Lord Wilberforce expressed that while duress does not destroy the will, for example to enter into a contract, it prevents the law from accepting what has happened as a contract valid in law. In the same case, the court stated that duress does not literally deprive a person affected of all choice but leaves the person affected with a choice between evils. In effect, as noted by the editors of **Chitty on Contracts** the basis of duress is a combination of illegitimate pressure and absence of practical choice.

29. In the recent decision in *John Mburu vs. Consolidated Bank of Kenya [2018] eKLR* this Court echoed the words of the Privy Council in *Pao On vs. Lau Yiu Long* (above) that in determining whether duress is established,

**“Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree that in a contractual situation commercial pressure is not enough. There must be present some fact on which could in law and be regarded as coercion of his will so as to vitiate his consent...In determining whether there was coercion of will such that there was no true consent it is material to enquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy, whether he was independently advised; and whether after entering the contract he took steps to avoid it.”**

30. Guided by those principles, the question is whether the learned Judge of the High Court was right in concluding that the appellants had not established duress, in the legal sense. Based on the evidence, the sequence of events leading up to the agreements appear to be this: An internal audit of the respondent’s operations at its Mombasa branch that was conducted by PW1 established discrepancies between the sales and cash receipts that resulted in loss to the respondent. According to the witness, fictitious entries were discovered in the loading books. That upon that discovery, the 1<sup>st</sup> appellant was “asked to come to the office but he did not come” whereupon “we reported to Makupa Police Station and he was arrested.” Under cross examination by counsel for the appellants,

PW1 stated, “I reported the matter to the police on 18/7/04. The 1<sup>st</sup> defendant did not report to work at all. That is why we reported even after he signed the agreement. He was arrested on 18<sup>th</sup> and was in custody till 20<sup>th</sup> or 21<sup>st</sup>.”

31. On his part, the 1<sup>st</sup> appellant, as already noted, stated that he went to the office, was arrested and put in Makupa Police Station. Under cross examination, he could not remember the date when he was arrested but was clear that he did not sign the agreement in the police station but maintained that he was arrested, the next day he was removed from the cells and taken to the office and signed the agreement.

32. Whereas the 1<sup>st</sup> appellant could not recall the date when he was arrested, it is instructive that the agreement he signed is dated 15<sup>th</sup> July 2004, which based on the evidence of PW1 was before his arrest on 18<sup>th</sup> July 2004. Indeed, in a letter dated 22<sup>nd</sup> July 2004 addressed to the Officer in Charge, Likoni Police Station withdrawing the complaint against the 1<sup>st</sup> appellant, reference is made to OB 21/17/7/04. That OB reference indicates, as submitted by counsel for the respondent, that the report to the police would have been made on 17<sup>th</sup> July 2004 by which time the 1<sup>st</sup> appellant had already signed the agreement on 15<sup>th</sup> July 2004.

33. In that letter dated 22<sup>nd</sup> July 2004 withdrawing the complaint, the operations manager of the respondent requested the officer in charge of the police station to “withdraw our complaints” against their employee the 1<sup>st</sup> appellant who was charged with the offence of theft for Kshs.401,860/- on the basis that “the family of the said employee has agreed to settle the said amount in full.” It is also noteworthy that the agreement by the 1<sup>st</sup> appellant’s father, the 2<sup>nd</sup> appellant, accepting liability for the shortfall incurred by the 1<sup>st</sup> appellant was separately signed on 21<sup>st</sup> July 2004. The observation by the Judge that the 1<sup>st</sup> appellant had not been arrested when he signed the agreement on 15<sup>th</sup> July 2004 is therefore supported by evidence.

34. Almost a month after the signing of the agreements, the appellants made payment of Kshs.70,000.00 to the respondent without suggesting that they had been coerced into entering into the agreements. It was not until the respondent filed suit against the appellants in 2005 for the outstanding balance of Kshs.331, 860.00 that the appellants in their defence claimed to have been coerced into entering into the agreements despite the fact that they had earlier opportunity to disclaim the agreements. Had the agreements been procured by duress, one would have expected that the appellants would have disowned the agreements at the earliest opportunity. Instead, a month after signing the agreements they made payment and did not raise any complaint until suit was filed against them in 2005. It is also noteworthy that in the statement of defence, the 1<sup>st</sup> appellant denied signing the agreement dated 15<sup>th</sup> July 2004 but resiled from that position during the trial.

35. Based on the foregoing, we agree with the High Court Judge that it was not established to the required standard that the agreements signed by the appellants undertaking to pay the amount of Kshs.401,860/- to the respondent, being the shortfall incurred by the 1<sup>st</sup> appellant as the Branch Manager of the respondent, were procured by duress. The decision of the High Court was in our view well founded.

36. There is therefore no basis for us to interfere with the decision of the High Court. The appeal fails and is accordingly dismissed with costs to the respondent.

Orders accordingly.

**Dated and delivered at Mombasa this 26<sup>th</sup> day of September, 2019.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

I certify that this is a true copy of original.

**DEPUTY REGISTRAR**